## THONG HONG KEE v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Storr, J.) May 10, 1952]

[Johore Bahru — Criminal Appeal No. 4 of 1952]

*Evidence — Uncorroborated evidence of a complainant who was an accomplice — Demeanour of witnesses — Appellate Court, when to interfere with trial Judge's decision.*

In this case the appellant, who was the Town Superintendent of the Kulai Besar Re-settlement Area, was convicted of obtaining $200 without consideration from a Chinese contractor, Tye Leong, and sentenced to 12 months imprisonment by the learned Magistrate, Johore Bahru. He was convicted on the uncorroborated evidence of the complainant. The learned Magistrate, in his grounds of judgment which were extremely sketchy and in general terms, stated that he was impressed by the demeanour of the complainant and looked upon him as a truthful witness and that he had not the slightest doubt that the amount received by the complainant was $2,000 and not $2,200. He also stated emphatically that before coming to his decision he had warned himself against convicting on the uncorroborated evidence of an accomplice. The learned Magistrate further stated that he could not accept the evidence of the accused.

**Held**, that while an appellate Court will always hesitate to overrule the decision of a trial Judge based upon the demeanour of witnesses whom he had had the opportunity of seeing in the witness-box nevertheless having considered in this case as a whole, it appeared that the learned Magistrate, when coming to the conclusion that he was impressed by the complainant's demeanour, did not give sufficient consideration to the evidence before him or take into consideration the great number of discrepancies and contradictions in his evidence, or test it with the evidence of the only other witness against which it could be tested. It was unsafe to convict the appellant upon the uncorroborated evidence of the complainant who was an accomplice.

*Cases referred to :—*

(1) *Tara Singh & Ors. v. Public Prosecutor* (1949) M.L.J. 88 at 89.

(2) *Yuill v. Yuill* (1945) 1 All E.R. 183.

(3) *Abraham Ho Ah Loke v. William Manson-Hing* (1949) M.L.J. 37.

(4) *Powell v. Streatham Manor Nursing Home* (1935) A.C. 243.

CRIMINAL APPEAL.

*K. A. Seth* for the appellant.

*T. A. Hepworth* (Federal Counsel), for the respondent.

*Cur. Adv. Vult.*

**Storr, J.** : — In this case the appellant, who was the Town Superintendent of the Kulai Besar Re-settlement Area, was convicted of obtaining $200 without consideration from a Chinese contractor, Tye Leong, and sentenced to twelve months imprisonment by the learned Magistrate, Johore Bahru. He was convicted on the uncorroborated evidence of the complainant.

The learned Magistrate, in his grounds of judgment which were extremely sketchy and in general terms, stated that he was impressed by the demeanour of the complainant and looked upon him as a truthful witness and that he had not the slightest doubt that the amount received by the complainant was $2,000 and not $2,200. He also stated emphatically that before coming to his decision he had warned himself against convicting on the uncorroborated evidence of an accomplice. The learned Magistrate further stated that he could not accept the evidence of the accused.

Mr. Seth who appeared for the appellant submitted that had the learned Magistrate considered the whole of the evidence of the complainant, he would of necessity have come to the conclusion that, owing to the many discrepancies, there must have been a reasonable doubt as to the guilt of the accused, and further that the explanation of the accused, even if not believed, was reasonable and should have raised a doubt in the mind of the learned Magistrate.

The main question to be considered in this appeal is whether on the record, as it stands, the Magistrate was right in accepting the complainant as a witness of truth. In cases of this kind, it is of course usually very difficult to obtain satisfactory evidence, but at the same time it must be borne in mind that it is extremely easy for such cases to be "trumped up" against any person in the position of the appellant who might possibly have been over-zealous in his duties. The evidence of a complainant must therefore be looked at with extreme care. It is true that in his grounds of judgment the learned Magistrate has stated that he was impressed by the demeanour of the complainant and looked upon him as a witness of truth, but the Court of Appeal in *Tara Singh and Ors. v. Public Prosecutor*[1] said :—

" 'an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question' [see judgment of Lord Greene, M.R. in **Yuill v. Yuill**[2]]. That was a civil case and the principle applies with even greater force to criminal cases, especially where, as usually happens in this country, the witness is a non-European giving evidence in his native tongue through interpretation."

That was a case where the 3 appellants had been convicted by the trial judge on the uncorroborated evidence of the complainant, but on considering the evidence the Court of Appeal held that, in spite of the findings of the learned trial judge, they could from the record examine his evidence, which they did, and they came to the conclusion that the evidence was not sufficient for the conviction to be upheld. That was not a case where the complainant was an accomplice.

Further, Pretheroe, Ag. C.J., President of the Court of Appeal, in *Abraham Ho Ah Loke v. William Manson-Hing*[3] stated :—

"Now when a Judge has come to a conclusion upon the question which of the witnesses, whom he has seen and heard, are trustworthy and which are not, he is normally in a better position to judge of this matter than an appellate tribunal, and the latter tribunal will generally defer to the conclusion of the trial Judge — **Powell v. Streatham Manor Nursing Home**[4]. **Yuill v. Yuill**[2] is authority, however, for the proposition that it is the duty of an Appeal Court to check by critical examination of the whole of the evidence a trial Judge's conclusion as to the truthfulness of witnesses."

Returning to the present appeal, I must therefore examine with care the evidence of the complainant. Looking at the complainant's evidence as a whole, I find that it is full of discrepancies. In his examination in chief he states : "When I received the $2,000 from the accused I did not ask the balance. I thought $200 was for the expenses of the accused. *I told the accused that the $200 was for the accused's expenses.*" But in cross-examination the complainant states : "I don't remember of counting the money when handed to me. The money was given to me by the accused. I did not count it. After I returned home I discovered I only received $2,000. After an hour later I counted the money. When accused handed me the money he said 'This money is for you'. *I took it without saying anything.* I signed P4 and D1 after I received the money. After I discovered $200 short, I did not look for the accused. *I thought $200* was for his expenses." Later he says : *"Neither the accused nor I said anything about the money when it was handed over to me nor at any time thereafter."* And in his statement to the police, which was made some three months after the alleged offence, the complainant states : "He (accused) took $200 and gave me $2,000 *and said that the $200 was for his coffee money and I kept quiet."*

It is extremely difficult from the above extracts to discover what exactly is the correct version of the complainant's story. Further in his evidence he stated that the money paid to him was in one bundle of $10 notes marked $1,000 and 2 $500 notes. He repeated this statement in cross-examination, but in re-examination he stated that there was one bundle of $10 notes and 2 bundles of $5 notes. There was evidence called by appellant that no $500 notes were issued by the bank.

There is only one point on which his evidence can be tested and that is the evidence with regard to Mr. Baird, the Re-settlement Officer. In his evidence the complainant said : "Later the same day I met Mr. Baird. Baird asked me whether I was given any money. I replied 'Yes, I did'. Mr. Baird asked me if I gave money to the clerk for tea. I replied 'Yes'. By clerk I meant the accused. I told Mr. Baird I gave accused $200 as tea, means expenses. I met Mr. Baird at his office." But Mr. Baird stated in examination in chief : "After P.W.1. (complainant) received payment, he approached me at my garage. P.W.1. told me in broken English 'Hong Kee — no good'. I asked P.W.1 — why. Again P.W.1 spoke to me in broken English and said — he made me give him money. I told P.W.1 that he had been paid $2,200. P.W.1 replied 'No' — he (accused) only paid me $2,000" and in cross-examination Mr. Baird said : "P.W.1 volunteered to give information for me. It was not true that I asked P.W.1. whether accused gave him money." It therefore shows that on the one point on which the complainant's evidence can be tested his evidence is unreliable.

It is unfortunate that in this case the appellant did not follow the regulations as to the payment of money in Government Financial General Orders. Had he done so, it would have been impossible for this charge to have been made against him. He has therefore only himself to blame for not being conversant with the regulations which are framed by Government not only for the protection of their officers when paying money to illiterate people but also for the protection of such people. Failure to comply with these regulations, however, does not mean that the appellant was necessarily guilty of the offence with which he was charged.

Having considered the case as a whole, I have come to the conclusion that the learned Magistrate, when coming to the conclusion that he was impressed by the complainant's demeanour as a truthful witness, did not give sufficient consideration to the evidence before him or take into consideration the great number of discrepancies and contradictions in his evidence, or test it with the evidence of the only other witness against which it could be tested, i.e. Mr. Baird.

Whilst an appellate court will always hesitate to overrule the decision of a trial judge based upon the demeanour of witnesses whom he had had the opportunity of seeing in the witness-box, I think in the circumstances of this case it was unsafe to convict the appellant upon the uncorroborated evidence of the complainant who was an accomplice.

For the above reasons I allow the appeal.

The conviction is quashed and sentence set aside.

*Appeal allowed.*